Wymes

THE HIGH COURT

1986 No. 6624P

BETWEEN

MICHAEL J. WYMES AND OTHERS

PLAINTIFFS

AND

LAURENCE CROWLEY AND OTHERS

DEFENDANTS

Judgment of Mr. Justice Murphy delivered the 27th day of February 1987.

By motion dated the 7th day of January 1987 three Orders were sought by the Plaintiffs. First, that a company and certain individuals should be joined as Plaintiffs, secondly that the Plenary Summons should be amended and thirdly that the first named Defendant should be directed to permit the Plaintiffs to conduct an inspection of certain lands and the minerals thereunder. Having regard to the urgency of the matter I made the first and second of the Orders sought but postponed giving my reasons for so doing until the conclusion of the hearing of the remainder of the motion.

In so far as the first part of the motions sought to have the named individuals Thomas C. Roche, Thomas J. Roche and Richard Wood joined as Plaintiffs no difficulty arose and no serious objection was made by any of the Defendants. However, all of the Defendants disputed the right of the Plaintiffs to join as an additional Plaintiff Bula Limited.

Bula Limited is the owner of certain lands and Nevinstown, Co. Meath and it appears to be clearly established that there is a valuable orebody under those lands. The shareholding in Bula Limited is owned as to 49% by the State, 40.8% by Bula Holdings and 10.2% by members of the Wright family. Bula Holdings in turn is effectively owned and controlled by the family interests of Thomas C. Roche, Thomas J. Roche, Richard F. Wood and Michael J. Wymes.

The second, third and fourtly named Defendants (the Defendant banks) have loaned sums of money in the order of £16,000,000 for principal and interest to Bula Limited. The repayment of those moneys was secured, inter alia, by means of debentures granted by Bula Limited to the Defendant bankers on foot of which the first named Defendant, Laurence J. Crowley, was appointed Receiver on the 8th day of October 1985.

In these proceedings an interim injunction was granted on the 2nd of July 1986 restraining the Receiver from selling the assets of Bula Limited on or prior to the 18th of July 1986. On the latter date the interlocutory application came on for hearing and was struck out on consent on the undertaking of the Receiver to apply to the High Court for approval for any offer for the purchase of the assets of Bula Limited and his undertaking to notify the Plaintiffs of such application. It was not contended then or at any time that the appointment of the Receiver was invalid or that there was any defect in the debenture under which he was so appointed. No challange has been made as to the right or power of the Receiver to dispose of the assets of Bula Limited charged by the debentures. The concern of the Plaintiffs has related to the terms on which

they are sold and more particularly the price to be obtained for them. No doubt the undertaking of the Receiver not to dispose of the assets charged without the sanction of the Court obtained on notice to the Plaintiffs is a procedure which fully protects the interest of both the Plaintiffs and the Receiver.

On the 14th of February 1986 a Petition was presented by the Defendant banks for the winding up of Bula Limited. That Petition was contested by Bula Holdings and others and was adjourned from time to time until the 18th of July 1986 when an Order was made by Mr. Justice Costello winding up the Company and appointing Mr. William McCann as Official Liquidator thereof. An appeal was lodged against that Order which is, I understand, listed for hearing on the 10th of March 1987. In the meantime a stay has been placed on the winding up Order.

The Defendants properly recognise that the appointment of a Receiver in pursuance of the powers in that behalf contained in a Mortgage Debenture does not terminate the powers vested by law in the directors of the Company. The combined effect of the Mortgage Debenture and the appointment of a Receiver is to appoint the Receiver as the Attorney of the Company to deal with and dispose of the assets charged in accordance with the terms of the contractual documents and subject to certain statutory provisions which are applicable in those circumstances. References have been made to "the residual powers of the directors" notwithstanding the appointment of a Receiver. This expression may be appropriate as in practice the security granted by a Company would ordinarily extend to all of its assets present and future and impose thereon a fixed or floating charge as might be appropriate to the nature of the assets and include in addition - as is done in the

present case - a power to carry on the business of the Company. In such cases and with that range of powers irrevocable delevated to the Receiver, the areas in which directors may lawfully and effectively exercise powers in no doubt limited but, as I say, that is the practical consequence of granting an extensive charge over the assets of the Company. If the parties were to confine themselves to a specific or limited area of charge or at any rate to exempt some of the properties of the Company from the Mortgage Debenture it would be appreciated more clearly in principle that the powers of the Receiver are those conferred upon him for the purpose of realising the security over which he is appointed and that all of the other powers to manage the affairs of the Company remain vested in the Board of Directors thereof.

I have no doubt but that the directors of Bula Limited retain their power to institute proceedings in an appropriate case. The limitation on their powers is that they must not deprive the debentureholders of the security granted to them and the very practical difficulty that the extensive nature of the charge deprives the Company of the means of financing litigation. That the directors of Bula Limited would be entitled to institute proceedings in the name of that company to sue for negligence a Receiver appointed over the assets of that Company could not be questioned as a matter of law.

What was urged on behalf of the first named Defendant was that the intended proceedings were an abuse of the process of the Court in as much as the Company was seeking to restrain the Receiver disposing of the assets charged in favour of the

Defendant banks notwithstanding the fact that no challenge had been raised to the validity of the debentures or the appointment of the Receiver. It was contended that the proceedings were seeking to "stultify or frustrate the Receiver's activities" contrary to the terms of the debentures as had been held by Chapman J. in Newheart Developments Limited .v. Co-operative Commercial Bank Limited. That decision was reversed on Appeal (1978 Q.B.814). At page 821 of the Report Shaw L.J. explained the position in the following terms:-

> "I see no principle of law or expediency which precludes the directors of a company, as a duly constituted board (and it is not suggested here that they were not a duly constituted board when they took the step of instituting this action) from seeking to enforce the claim, however illfounded it may be, provided only, of course, that nothing in the course of the proceedings which they institute is going in any way to threaten the interested of the debentureholders".

If and insofar as it is suggested that the purpose of these proceedings is to prevent the realisation on improper terms of any part of the assets of the Company that could not be contrary to the interest of the debentureholders and I cannot see that the allegations made in the interlocutory proceedings or the relief sought in the Plenary Summons, if supported by appropriate evidence, could be seen as a threat to the legitimate interests of the debentureholders.

In the circumstance I directed that Bula Limited should be jointed as a co-Plaintiff.

The second Order sought on the Notice of Motion was the

amendment of the Plenary Summons herein. This Order was opposed by the Defendant banks largely on the grounds that the amended claim seeking extended injunctive relief presaged further applications for interlocutory injunctions designed to delay the realisation of the assets of Bula Limited. In my view that suspicion is unwarranted. As I have already pointed out the existing arrangement in relation to the interloctury position with regard the realisation of the assets appear to protect the interest of all parties and it is difficult to see how or why there would be any further relief sought in that regard. In relation to this aspect of the matter there is too the reality that the Plaintiffs would be free to discontinue the existing proceedings and start afresh. In my view there is nothing to be gained by putting them to that expense and perhaps causing the Defendant unnecessary delay. Accordingly I granted the relief sought.

The third Order sought was the most contentious. The Plaintiffs are seeking the right to inspect - by suitable technical procedures - the orebody beneath the Nevinstown lands of Bula Limited (the Bula orebody). The right of inspection is sought under Order 50 Rule 4 of the Rules of the Superior Courts which provides as follows:-

> 4 The Court, upon the application of any party - - - for the purpose of obtaining full information or evidence".

The principles on which that Rule may be invoked were explained many years ago - coincidentally in a mining case - in Cooper .v. Incehall Company 72 W.N. 24. The material part of the judgment of Lindley J. was as follows:-

"An Order for inspection of this kind is so common in Chancery that I should have thought this was a matter of course. My impression is that the Plaintiffs are entitled almost as a matter of course to inspect the Defendants mines about the alleged boundaries".

In an earlier case - Bennitt and Whitehouse 28 BEAV 119 the Master of the Rolls had pointed out the necessity for establishing a prima facie case when he explained the right to inspection in the following terms:-

"Wherever it appears that a person has power to make use of his land to the injury of another, and there is prima facie evidence of his doing so, though it is contradicted, still, as the only way of ascertaining the fact is by an inspection, the Court always allows it, if it can be done without injury to the Defendant".

In the absence of a Statement of Claim it is difficult to speak with precision of the nature of the Plaintiffs' claim as against the Defendants or any of them but a reading of the numerous affidavits and documents exhibited therein indicates that the gist of the Plaintiffs' claim as against the Receiver is the alleged failure of the latter to detect at any time since his appointment (in October 1985) the continuing and apparently systematic larceny of the Bula orebody by the owners of the adjoining orebody, namely, Tara Mines Limited. Whilst the allegation against the Receiver is no doubt serious the allegation against Tara is vastly more so. Not merely is it alleged that they have misappropriated the Bula orebody but apparently the allegation made in this and in other proceedings is that this expropriation has continued for upwards of ten

years.

Whilst the defendants is the present case emphatically deny the claims made by the Plaintiff there is a significant difference between the present proceedings (the Bula action) and certain proceedings by the same Plaintiffs against Tara Mines Limited and others (the Tara action). The parties to the Bula action have a common interest in maximising the value of the Bula orebody and any other assets of Bula Limited. The greater the price realised the better the prospect of the Defendant banks being paid in full and an even more successful outcome would result, presumably, in a surplus for the individual Plaintiffs. At any rate the better the price obtained the lesser their liabilities on foot of the various guarantees. There is also the fact that now, as a result of an Order already made by me herein, the owner of the Bula orebody is a Plaintiff in these proceedings. This ownership is of course subject to the charge in favour of the Defendant bankers but the equity of redemption - and it has been suggested that this could be of enormous value - remains in Bula Limited. In this sense, therefore, Bula Limited is in fact asking for liberty to inspect its own property or at any rate property in which it does have a very substantial interest. Indeed one of the Objections raised by the Defendants is the failure of Bula Limited to undertake the proposed inspection during the period from 1976 to 1985 when that company had apparently untrammelled occupation of the lands in question.

It is in these circumstances that the Receiver entered into negotiations with the Plaintiffs, and in particular Mr. Wymes, with a view to facilitating the enquiries which the

Plaintiffs were pursuing. The Receiver, on the basis of the advice given to him by appropriate experts, suggested that the allegations of trespass (and larceny) could best be pursued by conducting an inspection and survey through the Tara Mines with the assistance of the plans or drawings prepared by Tara for the purposes of their mining operations.

This proposal was rejected by the Plaintiffs as a result of a report received by them dated the 21st January 1987 from A.B. Malkin, Consulting Geologist. It was his advice as provided in that report that:-

> "The procedures of plan examination followed by physical examination and surveys is constrained by (1) uncertainty as to the interpretation of the data obtained and (2) the time to carry out the operations. At the conclusion of this work it could still be necessary to resort to drilling for positive proof.
>
> In past instances of deliberate mine trespass it was common to find that the trespass workings were not shown on the working plan of the mine. Plan examination in these circumstances was thus of no value for ascertaining the existance of the trespass. Because of this situation there will be no way of knowing whether any plans produced for inspection will be complete or not".

Mr. Malkin summarised his conclusions in the penultimate paragraph of his report in the following terms:-

> "There are thus clear advantages in time and costs in short-circuiting the above procedures and moving

directly to the drilling of the exploratory boreholes which could, in any event, still be required even if the procedures are followed. Such boreholes would penetrate the maximum distance through the orebody and be spaced sufficiently close together to ensure that they intersected any workings that may be present. Back-fill, collapsed ground or mined out voids should be clearly indicated by the drilling and would identify with certainty the presence of any trespass".

Mr. Crowley's objections to the works proposed by Mr. Malkin were twofold. First he was concerned that damage might be cause to Bula orebody and secondly he was concerned that he might expose himself (or others) to liability for damage to persons or property as a result of works carried out on or under property in his possession or under his control. Mr. Crowley's concern was based partly on general legal principles but also on the express advice given to him by his geological experts Messrs MacKay and Schnellmann. Lengthy correspondence has passed between the solicitors on behalf of the parties with a view to resolving their differences and protecting their respective interests. However, it was not surprising to find that the lawyers could not resolve the problem seeing that it was based on a fundamental difference of opinion between experts in a different discipline, namely, the geologists engaged.

Mr. Malkin is fully confident that the works which he proposes will not give rise to any of the possible adverse consequences of which messrs MacKay and Schnellmannn are apprehensive. In his report dated the 26th of January 1987

Mr. Malkin deals with the possibility of damage to the orebody in the following terms:-

"2.1 In subparagraph (f) it appears the Receiver is concerned that the proposed drilling operation could cause damage to the orebody and place it at risk. No information is provided to define the nature of such damage or the risks to which the orebody might be exposed.

2.2 I understand that no circumstances are known which could have given rise to damage during the previous explorations and I know of no cause of damage or potential hazards which could arise from such boreholes drilled into a sulphide orebody set in bedded limestone strata and overlain by only a nominal thickness of cohesive overburden.

2.3 Approximately eighteen boreholes are planned and these will be similar to the previous two hundred or so boreholes already drilled into the orebody. So far as I am aware no damage has been caused or potential hazards created by this previous work. In any event, adequate insurance will be carried by the contractor to deal with damage as yet undefined, caused by his drilling operations.

2.4 In these circumstances I believe that acceptance of the Receiver"s proposals would lead to unwarranted restrictions on the conduct of the drilling operations".

There is no way in which I can resolve the conflict, such as it is, between Mr. Malkin and Messrs MacKay and Schnellmann with regard to the potential for damage to the orebody whether

by penetrating aquifers or otherwise. At best this difference could be resolved only after an oral hearing.

However it seems to me that (notwithstanding the paucity of evidence in support of the Plaintiffs' claim) inspection along the lines sought should be facilitated if that can be achieved whilst at the same time protecting the interests of the Defendants. I believe that this can be achieved by deferring to the confident and optimistic opinions expressed by the experts engaged by the Plaintiffs. I see no prospect of balancing the actions of one party and the supervision by the other. It seems to me that this would lead to disagreements and perhaps expose both parties to liability at the suit of others. What I propose to do is to require the Receiver to put the named experts in possession of the appropriate part of the lands of Nevinstown (defined by reference to a suitable map) to the exclusion of the Receiver during a specified period of time for the purpose of drilling not more than eighteen boreholes of a stipulated diameter. I envisage the obligations of the experts being set out in a contractual document to which the Receiver will be a party solely for the purpose of receiving the benefits of certain specific contractual obligations including the following:-

1. That no damage whatsoever will be caused to the site or to Bula orebody (or to any other property or person) other than damage consisting of first the drilling of the stipulated boreholes and the removal of the cores therefrom and secondly the despoiling of the surface of the lands as a result of the introduction of vehicles or other heavy

equipment on the site for the purposes of the drilling operations

2. Covenants will provide that the Plaintiffs' experts will be bound to restore and make good the damage aforesaid by back-filling the boreholes to the full depth thereof (save that in the case of boreholes encountering a void it will be necessary only to back-fill the borehole to the point where it intersects with the void). Secondly the experts will restore the site to the reasonable satisfaction of some appropriate expert by reseeding the grass and repairing any fences or similar works.

3. The experts will provide a bond for the due completion of the restoration works in a sum of £20,000.

4. The experts will be fully liable to the Defendants and in particular the Receiver for any other damage howsoever caused as a result of any works carried on by the experts or under their control or as a result of or during the course of their occupation of the site. Any possible liability of the experts under these headings to be secured by an insurance bond in sum of £1,000,000.

5. The agreement would expressly provide of course that the experts should be entitled to procure counter indemnities and securities from any contractors, miners or other operatives engaged by them.

6. The contract will provide that the experts will ensure the maintenance and preservation of detailed records of all drilling carried out and of the results and interpretation of those drillings and their agreement to provide all such information to the Receiver free of charge.

I do not propose to impose any term requiring the Plaintiffs to make any payment (at this stage) in respect of any experts which the Defendants or any of them may think fit to engage in relation to the inspection or otherwise.

I would be hopeful that the parties could agree upon the terms of the necessary legal documentation to give effect to such an agreement but in the event of a dispute due to a difference in drafting I will arrange to have it resolved by counsel appointed by the Court (if necessary) and any other insoluble problem can be referred back to the Court for decision.

A matter of the greatest concern, however, is the anticipated time limits. It has been suggested that a period of eight weeks would be required to bore four of the intended eighteen boreholes. If the correct inference from this is that it would take more than six months to complete the inspection it might be necessary for me to review the position and to hear the parties further on the matter. Clearly a commercial case of this importance and involving the allegations to which I have already referred must be heard without any unnecessary delay. Indeed I would expect the parties to be in a position to go to trial not later than the month of July of this year.

affirmed 4/3/87

Francis Ellis